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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINIC PETER GAGLIARDO,)
Appellant,)
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vs.)
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ITED STATES OF AMERICA,)
Appellee.)

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RESPONSE TO APPELLEE'S SUPPLEMENTARY BRIEF

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TABLE OF CASES CITED

RESPONSE TO APPELLEE'S SUPPLEMENTARY BRIEF

The following is submitted by the appellant by way d response to the material presented to the Court in the applementary brief filed on behalf of the Government. For te convenience of the Court, the present material has ben ordered under the respective legal points raised by tis appeal to which the material applies, but instead of fllowing the original order of points, the present order i related to the Government's supplemental brief.

POINT ONE: APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE OF PREJUDICIAL COMMUNICATIONS AND INSTRUCTIONS MADE PRIVATELY TO THE JURY BY THE TRIAL JUDGE.

The first communication.

The government's position with respect to the first cmunication (in which the trial judge denied the request of h jury for a dictionary) is that since the content of the cmunication did not add anything to, or detract anything from h regular instructions given by the court to the jury, that hs amounts to an affirmative showing on the record that the pellant was not prejudiced by that communication.

While it is true that the second communication s more obviously damaging to appellant, it does not follow at unless the particular nature of the prejudicial effect

ppears on the face of the communication that no prejudice xisted.

In considering the question, the guide lines set t in AH FOOK CHANG v. UNITED STATES, 91 F.2d 805 (9th CA, 37) must always be kept in mind, and it should be remembered at the fact of a private communication between the trial dge and the jury raises two kinds of questions--one procedural d one substantive--and these questions must to a certain ent be determined on the basis of independent considerations.

In Ah Fook Chang this Court held that the action of e trial court constituted reversible error on two grounds. e first ground was procedural in character, and the Court id:

> "The first is that appellants were entitled to be personally present at every stage of the trial . . . They could have waived that right by voluntarily absenting themselves from the trial, since they were not in custody . . . But a trial is supposed to take place in a courtroom, and here even if appellants had been in the courtroom, this proceeding would not have taken place in their presence, for it took place in the judge's chambers. If appellants had absented themselves from the courtroom voluntarily, they would have thus consented to the proceeding in the courtroom, but not at some other place. . . "
> (Omitting citations.)

refore, even if the communication were affirmatively shown

the record not to have been prejudicial, there would still emain the issue of the procedural error in denying the efendant the right to be personally present at his trial.

Counsel does not desire to belabor this point, t does want to urge that the issues of substance and procedure ought not to be confused and commingled through the agency of the doctrine of "prejudicial error."

In Ah Fook Chang the second ground for reversal was substantive, as to which the Court said:

> "The second ground of reversal is because of the communication by the court to the jury. It is error for the court to instruct or communicate with the jury in the absence of counsel and without notice to them. . .
>
> "Not all error, however, is reversible error. If the record shows affirmatively that the appellant was not prejudiced, then the error does not require reversal . . . Finally if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal . . . " (Omitting citations; emphasis supplied.)

The Government makes two mistakes in its position:

The first mistake is in the contention that unless the communication is in the nature of a further instruction on the aw, there is no error. This is a mistake because the rule of h Fook Chang applies to "instructions or communications."

The second mistake of the government is in its con-ention that unless prejudice appears on the face of the ommunication itself, then the record affirmatively shows here is no prejudice. This is not the law. Whether or t the communication is prejudicial is a matter to be etermined from the entire record, not just the communication tself.

For example, in *Ah Fook Chang*, the Court had already ssed on appellant's charge that the instruction given by e court orally to one juror, and to be relayed by him to the rst of the jury, was in itself a correct application of the law to that case. But, under the circumstances in which the istruction was conveyed to the jury, it could not be known wat the juror told the rest of the jury, and in the absence o such knowledge prejudice would be presumed.

In the present case, the prejudice lies in the fact hat the appellant was deprived of the right to have the jury interrogated by the Court as to the reason for their quest for a dictionary. Such an opportunity was one which hould have been afforded appellant because the jury had the ty of convicting or acquitting him on the basis of whether r not he had broadcast *obscene*, *indecent* or *profane* language, h jury should have had a definition of all of these terms. u at the trial, the instruction on obscene language was roneous, and the court totally omitted giving the jury a einition covering indecent language.

Clearly this is a case where the defendant was titled to have the perplexity of the jurors explored. A

imilar situation arose in the case of WRIGHT v. UNITED STATES, S.App., D.C., 1957, 250 F.2d 4, as to the issue of the efendant's sanity. The court gave the jury a simple Durham struction. After the jury had been deliberating for some me, one of the jurors asked for further instruction as to hether in determining sanity the jury could consider anything her than dementia or schizophrenia. The defendant requested the giving of a further instruction which was denied. The court then instructed the jury, in effect, that the instructions already given would not be amplified and the jury must rely on the court's earlier instructions. On appeal, it was held the court's refusal to answer the juror's questions and the denial of the requested instruction constituted reversible error, because in addition to evidence in the case about schizophrenia or dementia praecox (an older term for the same disease) there was also testimony about psychomotor epilepsy, psychomotor seizures, and tests showing the defendant to be a moron. The court held that in view of this evidence, the simple Durham instruction did not "provide the jury with guides for determining whether the accused /‾should/ be held criminally responsible."

An affidavit filed by appellant's counsel in this appeal states:

> "7. If your Affiant had known of the communications, he would have requested that the trial judge ascertain the cause of the jury's uncertainty which led them to request the use of a dictionary, and would have submitt

> to the court whatever supplemental instructions as were deemed necessary." (Appellant's Opening Brief, p. 50)

he first communication was prejudicial to the appellant under he circumstances of the case, and the government has made o attempt to establish, affirmatively, any absence of prejudic eversal of the conviction is required as to the first as well s the second communication on both procedural and substantive rounds.

. The second communication.

The Government's position here is that lack of rejudice is not affirmatively demonstrated by the record under the authority of Ah Fook Chang, prejudice can be resumed to exist and the conviction reversed.

The appellant certainly agrees that he is entitled a reversal of his conviction, but contends that the bstantive content of this communication is obviously rejudicial and this Court need have no resort to any resumption of prejudice.

This is not a matter of quibbling between opposing ounsel between a relatively mild and a relatively harsh ground r reversal. The matter is important because if there should a remand for new trial, the ruling of this Court should t leave in doubt the matters to be covered by the instructions to criminal intent and scienter, discussed at pages 31 and of Appellant's Opening Brief, and pages 14 and 15 of Appellan ply Brief.

POINT TWO: TITLE 18, SECTION 1464, UNITED STATES CODE, VIOLATES THE TENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS AN ATTEMPT TO EXERCISE POLICE POWER NOT BELONGING TO THE CONGRESS BUT RESERVED TO THE STATES.

The Government's position here, as set forth at pges 2 and 3 of its Supplemental Brief, is that the statute i constitutional because (1) the power to regulate interstate rdio communication includes the power to punish criminal nduct involving intrastate radio communications; and (2) cause the federal government has pre-empted the field of al regulation over interstate and intrastate radio communica- on.

The authorities relied on by the Government do not pport its position. <u>HEAD v. NEW MEXICO BOARD OF EXAMINERS</u> <u>OPTOMETRY</u>, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983, cussed at pages 11, 12 and 13 of Appellant's Reply Brief, lds that by the passage of the Federal Communications Act ngress did not intend to pre-empt the field or substitute eral law for state laws dealing with traditional crimes.

<u>UNITED STATES v. SUGDEN</u>, 226 F.2d 281 (CA 9th, 1955) cerned the application of the federal wire-tapping statute s a rule of evidence, wherein it was held the evidentiary mand of that law applied to intrastate messages by radio itored by federal agents, under the authority of <u>WEISS v.</u> <u>TED STATES</u>, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298.

nder the federal wire-tapping law.

While it is true that regulatory legislation will e liberally construed to effect its purpose, this is not rue with respect to the enactment and consideration of riminal laws, where the governing polestar has always been trict construction against the enacting authority.

UNITED STATES v. FULLER, (N.D. Cal., 1962) 202 F. upp. 356, the other case relied on by the Government, was federal prosecution under the federal wire-tapping provision, ut the case was defended on the theory that the statute nfringed against the constitutional guarantee of free speech, nd the constitutionality of the statute in question there nder the Tenth Amendment was not raised by the defendant nd was not considered by the court.

POINT THREE: THE EVIDENCE ESTABLISHED, AS A MATTER OF LAW, THAT THE APPELLANT WAS NOT GUILTY OF THE CRIME CHARGED AND HE IS ENTITLED TO A JUDGMENT OF ACQUITTAL.

The final portion of the government's supplemental brief concedes that the evidence did not establish that the appellant was guilty of having broadcast either profane or obscene language. The government further concedes that if this appeal is decided under the rule of DUNCAN v. UNITED STATES, 48 F.2d 128, cert.den., 283 U.S. 863 (9th CA, 1931) where this Court held that language, no matter how abusive,

hich tends to excite anger and disgust but not to excite assion and corrupt morals and arouse feelings of a lascivious ature, is not obscene or indecent, then the appellant is ot guilty of the crime charged against him.

The position of the Government is that this Court rred in Duncan in equating the word "indecent" with the ord "obscene," and that Duncan should now be overruled nd "indecent" construed to mean "language which is sexually oarse, vulgar, disgusting and which goes beyond the community' ense of sexual propriety." (Supp. Brief, p. 8) The Governmen urther urges that "indecent" should be equated with the word "ilthy" which appears in the postal obscenity statute onsidered in UNITED STATES v. LIMEHOUSE, 285 U.S. 424, 932), by way of judicial statutory amendment.

Perhaps the position of the Government would be ppropriate before a legislative body, but all it amounts to ere is an attempt to get this Court to enact a law under the ise of judicial construction.

But even more dangerous that that attempt is the substantive attempt made by the Government to get this Court t so liberalize the meaning of "indecent" that violations of oth the right of free speech and the requirement of reasonable rtainty in the specification of what constitutes criminal nduct will result. ROTH v. UNITED STATES, 1957, 354 U.S. 476 S.Ct. 1304, 1 L.Ed.2d 1498; UNITED STATES v. KELLER, (CA 3r 58) 259 F.2d 54.

In the last mentioned case the defendant was prosecut

for mailing post cards upon which language of indecent character was written. The court held that the language used on the cards did not present an appeal to prurient interest under contemporary ommunity standards, and such language did not fall within the urview of the statute proscribing mailing of a post card pon which language of an indecent character is written. It as not sufficient that the post cards contained words which ere vulgar and repugnant to one of average sensibilities. n the course of the opinion the court passed upon contentions hat the statute was an abridgement of the right of free speech nder the First Amendment, and that it violated the Fifth mendment in that the charge of using language of an "indecent haracter" in the counts of the indictment was too vague to pprise the defendant of the charges against him. The court ld that if the language used by the defendant was of an "indecent, lewd, lascivious, or obscene character" it was not rotected by the First Amendment. As to the matter of vagueness, he court held that the language of the <u>Roth</u> decision setting orth the test for judgment obscenity also applied to the dging of indecent language and the charge was therefore t unconstitutionally vague:

> ". . . While the Court spoke of 'judging obscenity', the essence of what was said does not permit a less stringent test for judging 'indecent' material. 'It is * * * vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.'

The Appellant is confident this Court will not ccept the invitation of the Government to enter upon the ield of legislation.

Respectfully submitted:

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ACKNOWLEDGMENT OF SERVICE

RECEIPT OF THREE COPIES of the foregoing Response Appellee's Supplementary Brief is hereby acknowledged is 12th day of August, 1966.

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